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5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
7 AT SEATTLE

8 BRITTANY EASTON,

9 Plaintiff,

10 v.

11 ASPLUNDH TREE EXPERTS, CO.,

12 Defendant.
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)
) CASE NO. C16-1694RSM
)

) ORDER DENYING PLAINTIFF'S
) MOTION FOR LEAVE TO AMEND
) COMPLAINT
)
)
)

14 THIS MATTER comes before the Court on Plaintiff's Motion for Leave to Amend her
15 Complaint, which seeks permission to add a retaliatory discharge claim against Defendant. Dkt.
16 #47. Defendant opposes the motion arguing that Plaintiff's proposal is prejudicial, futile and
17 unduly delayed. Dkt. #48. Trial is currently scheduled for March 19, 2018. For the reasons set
18 forth herein, the Court DENIES Plaintiff's motion.
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20 This is an employment action in which Plaintiff raises claims for violations of
21 Washington's Law Against Discrimination ("WLAD") based on sex (female), intentional
22 infliction of emotional distress, respondeat superior, negligent hiring and supervision and failure
23 to train, and hostile work environment. Dkt. #1-1. Plaintiff alleges that she had been hired by
24 Defendant as a flagger and was subsequently sexually harassed by her male supervisor. Dkt. #1-
25 1 at ¶¶ 1-10. Plaintiff further alleges that after she reported the harassing behavior to another
26 foreman and a supervisor, she suffered retaliation, Defendant failed to take appropriate corrective
27 action, and she was eventually laid off. *Id.* at ¶¶ 12-32.
28

ORDER
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1 Plaintiff alleges in her Complaint that

2 [She] complained [] to Mr. Fly on or around August 6, 2015. She was laid
3 off the following day under the pretense of budget constraints. Plaintiff
4 alleges that she was in fact fired for her complaints of Mr. Mel's
inappropriate, harassing, and discriminatory behavior. . . .

5 Dkt. #1-1 at ¶ 24. She does not address the fact that she was rehired again on or around September
6 27, 2015, and continued working until she was laid off again in late October 2015, although she
7 included the fact in her Complaint. Dkt. #1-1 at ¶ 6. Plaintiff did not plead a cause of action for
8 retaliatory discharge. See Dkt. #1-1 at ¶¶ 33-45.

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10 On December 21, 2016, Plaintiff provided her Initial Disclosures to Defendant. In those
11 Disclosures she stated that she had "not determined all damages and claims for special and
12 general damages and Plaintiff will supplement this information." Dkt. #38, Ex. 4 at 5. She
13 further stated that she may seek "compensatory damages for back pay, front pay, lost benefits
14 and medical expenses." Dkt. #38, Ex. 4 at 5. On August 31, 2017, Plaintiff provided
15 Supplemental Disclosures to Defendant repeating the same verbiage. *Id.*, Ex. 5 at 4.
16 Subsequently, in her discovery responses, Plaintiff objected that inquiries about the amount of
17 her wage loss claim was "beyond the scope of permissible discovery," but answered:
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19 Plaintiff has yet to consult with an economic loss or vocational expert to
20 determine the actual damages. Plaintiff will supplement with that
21 information as soon as it becomes available.

22 *Id.*, Ex. 6 at 10. Plaintiff has never provided Defendant with a specific calculation of her alleged
23 wage loss damages.

24 On October 10, 2017, Defendant moved for partial summary judgment. Dkt. #36.
25 Defendant argued that Plaintiff's claim for past and future wage loss should be dismissed because
26 she failed to plead a cause of action for retaliatory discharge. Dkt. #36 at 10-11. The Court agreed.
27 Dkt. #43. First, the Court noted that
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1 Plaintiff did not include an actual Cause of Action for retaliatory discharge. *See*
2 Dkt. #1-1 at ¶¶ 33-45. Instead, she pleaded five causes of action as follows: 1)
3 violation of Washington’s Law Against Discrimination (“WLAD”) based on
4 sex (female); 2) intentional infliction of emotional distress; 3) respondeat
superior; 4) negligent hiring and supervision and failure to train; and 5)
hostile work environment. *Id.*

5 Dkt. #43 at 6. As a result, the Court found that

6 [t]he allegations contained in Plaintiff’s alleged fact section of her Complaint
7 do not satisfy the “short and plain statement” requirement included in Rule
8 8. Plaintiff alleges that she was laid off as a result of her complaints, under
the pretext of budgetary constraints. Dkt. #1-1 at ¶ 24. However, because
9 she failed to plead a corresponding cause of action for retaliatory discharge,
she does not identify any legal basis for her claim. Plaintiff’s failure to
10 specifically allege the elements of retaliatory discharge restricted
Defendant’s ability to respond to the alleged cause of action or to conduct
11 discovery on that cause of action, and makes it nearly impossible for the
Court to evaluate the sufficiency of her allegations. Indeed, the Court cannot
12 even determine whether she asserts a cause of action under state or federal
13 law.

14 *Id.* at 6-7.

15 In addition, the Court determined that Plaintiff will be precluded from offering evidence of
16 lost past and future wages because “[a]t no point in this litigation did plaintiff quantify – even
17 roughly – the amount of actual damages she suffered as a result of her layoff.” Dkt. #43 at 7.
18 “In fact, she states she does not intend to ask for any specific amount at trial. However, making
19 certain documents available and promising that someone (in this case Plaintiff) will testify
20 regarding damages is not a “computation” and fails to apprise Defendant of the extent of its
21 exposure in this case.” *Id.* at 7-8.

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23 Plaintiff now seeks to get around this ruling by moving to amend her Complaint to include
24 a claim for retaliation.
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26 When a party moves to amend the pleadings after the deadline to amend pleadings has
27 passed, the party must first demonstrate “good cause” to amend the scheduling order pursuant to
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1 Federal Rule of Civil Procedure 16(b)(4) and then demonstrate that amendment is proper under
2 Federal Rule of Civil Procedure 15. *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 608
3 (9th Cir. 1992). “Rule 16(b)’s ‘good cause’ standard primarily considers the diligence of the
4 party seeking amendment. The district court may modify the pretrial schedule ‘if it cannot
5 reasonably be met despite the diligence of the party seeking the extension.’” *Johnson*, 975 F.2d
6 at 609 (citing Fed. R. Civ. P. 16 Advisory Committee’s Notes (1983 Amendment)).

8 If the good cause standard is met, the Court turns to the question of whether amendment
9 is proper. Federal Rule of Civil Procedure 15 mandates that leave to amend “be freely given
10 when justice so requires.” Fed. R. Civ. P. 15(a). “This policy is to be applied with extreme
11 liberality.” *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir. 2003)
12 (quotation omitted). In determining whether to allow an amendment, a court considers whether
13 there is “undue delay,” “bad faith,” “undue prejudice to the opposing party,” or “futility of
14 amendment.” *Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962). “Not
15 all of the [*Foman*] factors merit equal weight. . . . [I]t is the consideration of prejudice to the
16 opposing party that carries the greatest weight.” *Eminence Capital*, 316 F.3d at 1052 (citation
17 omitted). “The party opposing amendment bears the burden of showing prejudice.” *DCD*
18 *Programs, Ltd. v. Leighton*, 833 F.2d 183, 187 (9th Cir. 1987). “Absent prejudice, or a strong
19 showing of any of the remaining *Foman* factors, there exists a *presumption* under Rule 15(a) in
20 favor of granting leave to amend.” *Eminence Capital*, 316 F.3d at 1052.

21 In this case, the Court never set a deadline for amending pleadings. *See* Dkt. #12. As a
22 result, Plaintiff is not required to seek a modification of the Court’s Scheduling Order, and the
23 “good cause” standard is not implicated. Accordingly, the Court turns to whether amendment is
24 proper in light of the *Foman* factors.

1 Defendant primarily argues that Plaintiff has unduly delayed in bringing the instant
2 motion and that to add the proposed retaliation claim now would prejudice it. The Court agrees.
3 This Court has defined ‘undue delay’ as a “delay that prejudices the nonmoving party or imposes
4 unwarranted burdens on the court.” *Mansfield v. Pfaff*, No. C14-0948JLR, 2014 U.S. Dist.
5 LEXIS 105997, at *10 (W.D. Wash. Aug. 1, 2014). The test for “undue delay” requires
6 consideration of (1) the length of the delay measured from the time the moving party obtained
7 relevant facts; (2) whether discovery has closed; and (3) proximity to the trial date. *Wizards of*
8 *the Coast LLC v. Cryptozoic Entm’t LLC*, 309 F.R.D. 645, 652 (W.D. Wash. 2015).

10 Having reviewed the record in this matter, the Court agrees with Defendant that Plaintiff
11 unduly delayed in bringing her proposed claim, and that she could have done so from the time
12 this case was removed to federal court. *See* Dkt. #48 at 5-9. Indeed, Plaintiff admitted to the
13 Court previously that she pled a retaliatory discharge claim in her complaint to the EEOC prior
14 to filing this lawsuit, and now argues that she simply chose to proceed with state claims alone.
15 Dkts. #40 at 9 and #50 at 5. Further, Plaintiff discussed with Defendant early in this case a
16 proposed Amended Complaint that would add a claim for retaliatory discharge. Dkt. #49 at ¶¶
17 2-3 and Exs. A and B thereto. Although Defendant declined to stipulate to the amendment,
18 Plaintiff never filed a motion to amend. Plaintiff claims now that she did not file such a motion
19 because she felt she had adequately pled such a claim in her original Complaint. Dkt. #50 at 5.
20 However, counsel’s correspondence and proposed Amended Complaint belie that assertion. Dkt.
21 #49, Exs. A and B.

25 Moreover, discovery in this matter is now closed, and trial is just two months away.
26 Although Plaintiff asserts that Defendant already has complete discovery on any retaliation
27 claim, the Court has already ruled to the contrary. *See* Dkt. #43.

1 “Prejudice” exists where an amendment creates “undue difficulty in prosecuting a lawsuit
2 as a result of a change of tactics or theories on the part of the other party.” *Mansfield*, 2014 U.S.
3 Dist. LEXIS 105997, at *11-12; *see also Deakyne v. Cmmsrs. of Lewes*, 416 F.2d 290, 300 (3d
4 Cir. 1969); *Amersham Pharmacia Biotech, Inc. v. Perkin-Elmer Corp.*, 190 F.R.D. 644, 648 (N.D.
5 Cal. 2000). The nonmoving party has the burden to show “that it was unfairly disadvantaged or
6 deprived of the opportunity to present facts or evidence which it would have offered had the . . .
7 amendments been timely.” *Mansfield*, 2014 U.S. Dist. LEXIS 105997, at *11-12 (citing *Bechtel*
8 *v. Robinson*, 886 F.2d 644, 652 (3d Cir. 1989)). “As a corollary, delay alone is not sufficient to
9 establish prejudice, nor is a need for additional discovery.” *Id.* For the reasons set forth above,
10 the Court agrees that adding a claim for retaliatory discharge now would cause prejudice.
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12 Accordingly, this Court hereby finds and ORDERS that Plaintiff’s motion to amend (Dkt.
13 #47) is DENIED.
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15 DATED this 12 day of January, 2018.
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19 RICARDO S. MARTINEZ
20 CHIEF UNITED STATES DISTRICT JUDGE
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